The second way in which the argument has been put is that business practices in international trade have changed so much since the *Gamage* case was decided, that the time has come when the common law should be developed by their Lordships in such a way as would make available an action for passing-off in circumstances such as those in which the appellant finds itself in the instant appeal. The submission is, that the courts in the exercise of the judicial power should extend to the user of an unregistered mark or get-up proprietary rights similar to those which have been conferred by statute upon the registered proprietor of a registered trade mark. These, it is contended, should include (1) the right conferred by section 30 of the Trade Marks Act of Singapore (which substantially reproduces section 28 of the United Kingdom Trade Marks Act 1938) to permit the use of the registered trade mark by another person ("the registered user") where the owner maintains a sufficient degree of control over the permitted use and (2) the right conferred by section 42 of the Singapore Act (which reproduces section 22 of the United Kingdom Trade Marks Act 1938) to assign the registered trade mark otherwise than in connection with the goodwill of a business, provided that there would not subsist exclusive rights in more than one of the persons concerned to the use of the mark in relation to goods to be sold or otherwise traded in within Singapore.

These are rights which the Hong Kong company might have been able to exercise if it had registered the get-up of its goods in the Register of Trade Marks in Singapore; but that it was the intention of the Parliament in Singapore, as it was of Parliament in the United Kingdom, to confine these novel statutory rights to registered trade marks, is in their Lordships' view apparent from (a) the express provisions of section 42(3) of the Act which confine the right to assign unregistered trade marks, otherwise than in connection with the goodwill of a business, to unregistered marks which are assigned together with a registered trade mark used in the same business in relation to the same goods, (b) section 49 of the Act which provides that no person shall be entitled to institute any proceedings to prevent or recover damages for the infringement of an unregistered trade mark, and (c) section 53 which provides that nothing contained in the Act shall be deemed to affect rights of action against any person for passing-off his goods as those of another person or the remedies in respect thereof.

In view of this clear indication of the intention of Parliament, it is not in their Lordships' view open to a court to change the common law in the way in which they have been urged to do so by the appellant.

For these reasons their Lordships will dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Simmons & Simmons; Collyer-Bristow & Co.*

MOHAMED YASIN BIN HUSSIN v. PUBLIC PROSECUTOR

[Privy Council (Lord Diplock, Lord Kilbrandon and Lord Edmund-Davies) February 2, 1976]

[Privy Council Appeal No. 17 of 1975]

Criminal Law and Procedure — Causing death in course of committing rape — No intention to cause bodily injury sufficient in the ordinary course of nature to cause death — Act of accused in sitting forcibly on chest of deceased a rash act — Penal Code, ss. 299, 300 & 304A.

Penal Code, ss. 299, 300 & 304A.

In this case the appellant had been found guilty in the High Court in Singapore of the offence of murder under section 300 of the Penal Code. His appeal to the Court of Criminal Appeal was dismissed (see [1975] 1 M.L.J. 52). The facts in the case showed that the appellant and another person had gone into a hut at Pulau Ubin with the intention of committing robbery by night. In the course of the robbery the appellant had grabbed the deceased, thrown her to the ground and subsequently raped her. Medical evidence showed that the fatal injuries on the deceased consisted of fractures of the ribs in the front portion of the chest which had resulted in congestion of the lungs and cardiac arrest. The injuries were consistent with someone sitting with force on the chest of the deceased as she was lying on the floor on her back.

Held, allowing the appeal; (1) there was no evidence in this case to show that the appellant intended by sitting on the victim's chest to inflict upon her some internal, as distinct from mere superficial, injuries or temporary pain and therefore the appellant's conviction for murder must be set aside;

(2) for similar reasons a conviction for culpable homicide could not be substituted for the conviction, as intention on the part of the accused to inflict such bodily injury as is likely to cause death is a necessary ingredient of the offence;

(3) the act of the appellant in sitting forcibly on the chest of the deceased was a rash act within the meaning of section 304A of the Penal Code and the case will therefore be remitted to the Court of Criminal Appeal with a direction to convict the appellant of an offence under that section and to pass such sentence warranted by law for that offence as they think fit.

Case referred to:-

(1) *Virsa Singh* v. *State of Punjab* A.I.R. 1958 S.C. 465 at p. 467.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

George Newman for the appellant.

Gerald Davies for the respondent.

Lord Diplock (delivering the judgment of the Board): The appellant was found guilty by the High Court of the offence of murder under section 300 of the Penal Code and was condemned to death. Murder was the only offence with which he had been charged. His appeal against his conviction was dismissed by the Court of Criminal Appeal. He now appeals against his conviction to the Judicial Committee of the Privy Council by special leave of this Board.

The only questions in this appeal are whether, upon the findings of fact made by the two judges of the High Court by whom the appellant was tried, the charge of murder under section 300 of the Penal Code was made out and, if it were not, whether upon those findings he should have been convicted of the offence of culpable homicide under section 299 or of causing death by a rash or negligent act under section 304A.

The relevant provisions of the Penal Code are in the following terms:

"299. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

300. Except in the cases hereinafter excepted culpable homicide is murder —

(a) if the act by which the death is caused is done with the intention of causing death; or

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

304A. Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both."

The relevant facts can be stated shortly. The victim was a Chinese woman, Poon Sai Im, who lived alone in a hut on the island of Pulau Ubin, where she ran a small provision shop. She was 58 years of age, 4' 10" in height and weighed 8 stone (112 lb.). She had no physical idiosyncracies which rendered her more susceptible to fatal injury than a normal person of her age. The crucial evidence against the appellant consisted of his own confession made before a Magistrate and the evidence of a pathologist as to the injuries which the victim had received. According to his confession, the appellant, together with another person, Hurun bin Ripin, who was jointly charged with him, went to the victim's hut at night on April 22, 1972, intending to burgle it. They were unable to gain entry clandestinely; so they created a disturbance, as a result of which the victim came to the door of the hut. The accused grabbed her and threw her to the ground. In the course of the struggle, her trousers slipped off and, according to the accused, he was overcome by sexual desire and raped her. When he had finished doing so he discovered she was dead and with the assistance of his co-accused, who in the meantime had been rifling another room in the hut, he threw the body of the victim into the sea.

The evidence of the pathologist was that the victim had received a number of superficial injuries, *i.e.* bruises and abrasions, including bruises on both her knees consistent with her legs having been forced apart, and abrasions on the vaginal wall. None of these superficial injuries was sufficient in the ordinary course of nature to cause death. The fatal injuries, according to the pathologist, consisted of fractures of the second to fifth ribs on the left and of the second to sixth ribs on the right, in the front portion of her chest. These fractures that had caused congestion of the lungs, resulted in cardiac arrest. They were consistent with, and were most likely to have been caused by, someone sitting with force on her chest as she was lying on the floor on her back. In his opinion, which was accepted by the trial judges, they were sufficient in the ordinary course of nature to cause death.

The trial judges found that the only common object of the appellant and his co-defendant, was burglary and that the death of the victim was not caused by any act done by the appellant in furtherance of this common object. It was done in furtherance of the appellant's own unpremeditated impulse to have sexual intercourse with the victim. They accordingly acquitted the co-defendant of the charge of murder, but found him guilty of robbery by night under section 392 of the Penal Code.

The trial judges found that the injuries which resulted in the death of the victim were caused by the appellant's sitting forcibly on the victim's chest in the course of a violent struggle when she was resisting his attempt to rape her. Their reasons for finding him guilty of murder were expressed succinctly: —

"On the evidence before us we have no doubt at all that the aforesaid fatal injury was intentionally caused by the second accused and that it was not caused accidentally or otherwise unintentionally. Consequently the act of the second accused in causing the fatal injury was an act which clearly falls within the third limb of the definition of murder [sc. s. 300(c)] because he intended to inflict that injury within the meaning of the said third limb and we accordingly find him guilty of murder as defined in the Penal Code."

In their Lordships' view, this fails to give effect to the distinction drawn in sections 299 and 300 of the Penal Code, in cases where the accused did not deliberately intend to kill, between the act by which death is caused and the bodily injury resulting from that act. In the instant case, the act of the appellant which caused the death, *viz.* sitting forcibly on the victim's chest, was voluntary on his part. He knew what he was doing; he meant to do it; it was not accidental or unintentional. This, however, is only the first step towards proving an offence under section 300(c) of the Penal Code. Not only must the act of the accused which caused the death be voluntary in this sense; the prosecution must also prove that the accused intended, by doing it, to cause some bodily injury to the victim of a kind which is sufficient in the ordinary course of nature to cause death.

In the instant case, the bodily injury caused by the appellant's voluntary act was the fracture of the victim's ribs. It was established by the evidence of the pathologist that this injury was of a kind sufficient in the course of nature to cause death by cardiac arrest. The lacuna in the prosecution's case which the trial judges overlooked was the need to show that, when the accused sat forcibly on the victim's chest in order to subdue her struggles, he intended to inflict upon her the kind of bodily injury which, as a matter of scientific fact, was sufficiently grave to cause the death of a normal human being of the victim's apparent age and build even though he himself may not have had sufficient medical knowledge to be aware that its gravity was such as to make it likely to prove fatal.

There was no finding of fact by the trial judges that this was the appellant's intention; nor, in their Lordships' view, was there any evidence upon which an inference that such was his intention could have been based. There was no admission by the accused that he had sat on the victim's chest at all. The judges' finding that he did so was based upon the evidence of the pathologist, which they were entitled to accept,

that this was the most probable way in which the internal injuries to the victim's ribs had been caused. But to fall on someone's chest, even forcibly, is something which occurs frequently in many ordinary sports, such as Rugby Football, and though it may cause temporary pain, it is most unusual for it to result in internal injuries at all, let alone fatal injuries.

To establish that an offence had been committed under section 300(c) or under section 299, it would not have been necessary for the trial judges in the instant case to enter into an enquiry whether the appellant intended to cause the precise injuries which in fact resulted or had sufficient knowledge of anatomy to know that the internal injury which might result from his act would take the form of fracture of the ribs, followed by cardiac arrest. As was said by the Supreme Court of India when dealing with the identical provisions of the Indian Penal Code in *Virsa Singh* v. *State of Punjab*[1] at page 467:

"that is not the kind of enquiry. It is broad-based and simple and based on commonsense."

It was, however, essential for the prosecution to prove, at very least, that the appellant did intend by sitting on the victim's chest to inflict upon her some internal, as distinct from mere superficial, injuries or temporary pain.

The trial judges did not find this to be proved. There was no evidence upon which such a finding could have been based, had they directed their minds to the question. It follows, therefore, that the appellant's conviction for murder must be set aside. For similar reasons a conviction for culpable homicide under section 299 cannot be substituted for the conviction under section 300(c), since an intention on the part of the accused to inflict such bodily injury as is likely to cause death is a necessary ingredient of an offence under the relevant part of section 299.

In their Lordships' view, however, the act of the accused in sitting forcibly on the chest of the deceased was a "rash" act within the meaning of section 304A. The trial judges ought to have exercised their power under section 168(2) of the Criminal Procedure Code to convict the appellant of an offence under that section of the Penal Code. Section 54 of the Supreme Court of Judicature Act empowers the Court of Criminal Appeal to substitute a conviction for an offence under section 304A of the Penal Code for a conviction by the trial judges of an offence under section 300 and to pass on the appellant a sentence appropriate to the lesser offence.

The appellant was not charged either with the offence of rape under section 375 of the Penal Code or of the offence of robbery by night under section 392. Upon the evidence of his confession, assuming it to be admissible at all — a matter that was highly contested at the trial — whatever doubts there may have been about the charge of murder it was not doubtful whether the facts necessary to constitute these other offences could be proved against the appellant. In their Lordships' view the case did not fall within section 165 and section 166 of the Criminal Procedure Code and it would not have been open to the trial judges to have convicted the appellant of either rape or robbery without an amendment of the charge against him. He has not yet been in jeopardy on either of these charges. It is a matter for the respondent to decide whether to charge him with them now, so long after the event.

Their Lordships will allow the appeal and set aside the conviction of the appellant for the offence of murder under section 300 of the Penal Code. The case will be remitted to the Court of Criminal Appeal with a direction to convict the appellant of an offence under section 304A of the Penal Code and to pass such sentence warranted by law for that offence as they think fit.

Appeal allowed.

Solicitors: *Coward Chance; Charles Russell & Co.*